UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Care Environmental Corporation,

Plaintiff, CV-05-1600 (CPS)

- against - MEMORANDUM OPINION AND ORDER

M2 Technologies Inc., et al,

Defendants.

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SIFTON, Senior Judge.

Plaintiff, Care Environmental Corporation ("Care"), invokes this Court's diversity jurisdiction to bring this action against M2 Technologies Inc., ("M2"), Dragon Chemical Corporation ("Dragon"), Burlington Bio-medical Corporation ("Burlington") (collectively the "corporate defendants"), against Frank Monteleone, Dominick Sartorio and Roger Brown (collectively the "individual defendants") and against CMB Additives, LLC ("CMB"). Plaintiff's amended complaint alleges eleven claims for relief. Claims one through four seek judgment against the corporate defendants for breach of contract (count two), services sold and delivered (count three), and account stated (count four). The fifth claim for relief alleges common law fraud against the corporate defendants and the individual defendants. Claim six seeks relief against CMB and the corporate defendants for the debts and obligations with respect to the removal of hazardous waste of M2 on a theory of successor liability. Claims seven and

eight seek to pierce the corporate veil and impute corporate liability to the individual defendants. Claims nine through eleven seek recovery against the individual and corporate defendants under New York Debtor & Creditor Laws §§276, 275, and 273, respectively. Presently before the Court is defendants' motion for leave to amend their answer to assert four counterclaims. For the reasons set forth below the defendants' motion is granted in part and denied in part.

BACKGROUND

The following facts are drawn from my prior opinion addressing plaintiff's motion to dismiss the complaint and from the Second Amended Complaint.

The Parties

Care is, and has been at all relevant times, a New Jersey corporation, authorized to conduct business in the State of New York, with its principal place of business located at 10 Orben Drive, Landing, New Jersey, 07850. It is engaged in the business of collection, identification, storage, transportation and disposal of hazardous waste materials.

Defendant M2 is, and has been at all relevant times, a Delaware corporation with its principal place of business located at 71 Carolyn Boulevard, Farmingdale, New York, 11735-1527. Its authorization to do business in the State of New York is currently inactive. At all relevant times M2 has owned and

operated Burlington.

Defendant Burlington is, and has been at all relevant times, a Delaware corporation with its principal place of business located at 71 Carolyn Boulevard, Farmingdale, New York, 11735-1527, and a location at 7033 Walrond Drive, Roanoke, Virginia 24019. Burlington acquired Dragon in 1998 and since then has owned and operated it.

Defendant Dragon is, and has been at all relevant times, a Delaware corporation with its principal place of business located at 71 Carolyn Boulevard, Farmingdale, New York, 11735-1527, and a location at 7033 Walrond Drive, Roanoke, Virginia 24019.

Defendant CMB is, and has been at all relevant times, a Delaware limited liability company with its principal place of business located at 71 Carolyn Boulevard, Farmingdale, New York 11735-1527, and an address at 2711 Centreville Road, Suite 400, Wilmington Delaware. During the pendency of this action M2 transferred substantially all its assets to CMB. CMB operates out of the same physical location as M2 (the Farmingdale location), employs the same personnel, utilizes the same web address and website that M2 had previously used, and is owned by the same individuals as the owners of M2, namely defendants Brown and Sartorio.

Defendant Frank Monteleone is and has been at all relevant times, Chief Operating Officer of the Corporate Defendants and of

CMB. He is alleged in the complaint to be a resident of New York state.

Defendant Dominick Sartorio is and has been at all relevant times, Chief Executive Officer of the corporate defendants and of CMB and a 50% shareholder of the corporate defendants and CMB. He is alleged to reside in New York state.

Defendant Roger Brown is, and has been at all relevant times, the President of the corporate defendants and of CMB and a 50% shareholder of the corporate defendants and CMB. He too is alleged to reside in New York state.

The Agreement

Prior to the agreement at issue in this litigation (the "Agreement"), Care had never done business with M2. Accordingly, as a pre-condition to entering into the Agreement with M2, Care required that M2 furnish Care with financial documentation demonstrating its ability to make the payments required under the Agreement. This documentation took two forms. First, M2 provided Care with an internal draft of M2's Consolidated Income Statement and Balance Statement for the year ending September 30, 2004 (together, "M2's Financials"). These financials showed, in relevant part, that M2 had net sales in excess of $16 million and net income after taxes of more than $1.25 million. Second, Care reviewed a report on M2 prepared by Dun & Bradstreet (D&B) based on financial data provided to D&B by Brown, M2's president.

Relying on this financial information, Care decided to enter into the Agreement with M2 for Care to perform environmental services, including the collection and removal of hazardous waste material at the Dragon facility in Roanoke, Virginia, and the decontamination of the premises following the removal. Care now asserts that this financial information was false and misleading because M2 is not in fact a profitable company with substantial assets, but rather was already insolvent, or was rendered insolvent by the obligations to Care under the Agreement.

The Agreement consisted of a December 28, 2004 proposal, a January 10, 2005 letter and a January 12, 2005 acceptance. Each of these documents was addressed to "M2 Technologies/Dragon Chemical." The Agreement provided that Care would dispose of the waste in compliance with all applicable state and federal rules and regulations. Estimated costs for the disposal were calculated based on the weight of the waste to be disposed of, which M2 estimated to be 135,000 lbs. However the Agreement stated that the estimation was not binding and that actual costs would be calculated based on the actual weight of waste disposed of. Thus, the Agreement provided in relevant part:

> ● Care Environmental Corp. will furnish the services presented in this quotation on a per unit basis, based on the information and data provided to them. Care Environmental expects that the services in this quotation can be accomplished for the estimated fee.
>
> ● The Client is responsible for any additional charges assessed by Care Environmental, for waste which exceeds

the quoted constituent limits.

- Upon receiving the D&B Business Information Progress Report, Care Environmental will base billing on Net 30 days.[1]

Under the agreement Care would collect and transport the hazardous waste material, but would not dispose of the material itself. Rather, the disposal, accomplished by incineration, was to be performed at third party disposal sites, contracted for by Care. Because Care would have to pay the third party for disposal, Care needed M2 to pay the invoices on a timely basis. Furthermore, the January 10 letter provided that:

> It is acknowledged that payments on invoices submitted to you [M2] in connection with these services are processed upon receipt [sic] invoices, and that no other documentation is required for the remittance of payments to Care Environmental Corp. Kindly acknowledge this by signing in the space below . . . If additional documentation is required in order to remit payments on invoices, please specify what documentation is required in the space provided below and sign the acknowledgment.

M2 did not specify any additional documentation that would be required in order to remit payments on the invoices. Rather, Frank Monteleone, as COO of M2, signed the letter under a statement reading:

> I hereby acknowledge, as an authorized representative, that payments on invoices are authorized as stated above.

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[1] Neither party defines "net 30 days." However, plaintiff stated that the invoices were issued on January 14, January 18, and February 2, and came due, respectively, on February 12, February 17, and March 4. It therefore appears that the "net 30 days" simply means 30 days after the invoice was issued.

Thereafter, Care began waste removal. Early in the project it became apparent that the volume of waste was in excess of M2’s original estimate of 135,000 lbs. Care communicated this to M2's COO, Monteleone and M2's general manager, Richard Howe. M2 directed Care to remove and dispose of all the waste, notwithstanding the fact that the volume exceeded their initial estimate.

On January 13, 2005 Care issued its first invoice to M2 in the amount of $101,762.60. This invoice approached the total amount of the initial estimate for total waste collection under the Agreement, yet, at that juncture, an equivalent amount or more of waste remained to be removed. Nevertheless, Monteleone instructed Care to continue working to remove the remainder. M2 did not object to the amount of the initial invoice or the volume stated therein.

Care continued to remove and transport the waste, and accordingly issued similar invoices on January 18 and February 2, 2005. M2 did not object to the dollar amount or volume of waste listed in these invoices.

Upon completion of the project in early February, Richard Howe, Dragon’s plant manager, completed a walk through of the plant with an unidentified representative of Care. Howe expressed his thanks for a job well done and voiced no complaints. The owner of the building also conducted an inspection and voiced

satisfaction with the appearance of the plant. On the final evening of the project, Howe went out to dinner with Care employee Daniel Schweitzer and told him that Care had done an excellent job. Howe offered to provide a letter of recommendation concerning the excellent quality of Care's services.

On February 12, 2005 the first invoice came due and was not paid. On February 17, 2005 the second invoice came due and was not paid. On March 4, 2005 the third invoice came due and was not paid.

Once the material was collected, Care trucked the material to various disposal facilities for incineration, and the third party facilities began disposal. The facilities, in turn, invoiced Care for the cost of the disposal. Thereafter, Care began to press M2 for payment. In response, M2 raised, for the first time, an objection to payment on the basis of the excessive volume of material collected. M2 also objected to the inclusion of the weight of the pallets upon which the waste material had been stored in the disposal volume.

Care attempted to discuss these issues with Monteleone. However, numerous messages and voice mails left by Care's president, Francis McKenna Jr., and Care's operations manager Kodrowski for Monteleone were left unanswered. No payment was made even on that portion of the invoices which was uncontested. Concerned that it was incurring costs in the disposal of the

waste which defendants did not intend to reimburse, McKenna sent a letter to Monteleone, stating in relevant part:

> You are of course entitled to be satisfied as the accuracy of our invoices, however, payment of all of our outstanding invoices is now grossly overdue. We cannot in good conscience continue to advance substantial sums of money in connection with the disposal of your waste in the face of our substantial outstanding invoices, none of which have been paid. Your conduct has left us with no alternative but to consider other alternatives, including instructing the disposal sites to suspend disposal of your material and/or returning any remaining unprocessed material to your premises.
>
> In order to move forward on an amicable basis, we must insist that you make substantial in-roads on our outstanding invoices immediately. We can and will certainly address any legitimate issues concerning our invoices, however, clearly the overwhelming majority of our services are not even in dispute. I am prepared to meet with you at your offices on Monday, March 14, 2005 to work out a payment schedule and framework for resolving the outstanding issues. Please call me immediately so that we can arrange a mutually convenient time. (emphasis in the original).

Care received no response. Accordingly, by letter dated March 18, 2005 Care's attorneys wrote to M2 stating:

> In light of your breach and failure to cure such breach, Care Environmental has been forced to mitigate its damages by instructing the disposal sites to suspend disposal of any material which has yet to be disposed of. Our client will not incur any further expense in view of your complete unwillingness to pay for the services contracted.
>
> Our client intends to return to you any material which has yet to be disposed of by the disposal sites. Please contact me immediately to make arrangements to retrieve your material. If I do not hear from you immediately, our client will take whatever action it deems appropriate regarding the disposition of your materials, including, but not limited to, return of the

> materials to the point of origin, or any of your other locations. Any expense to your client in this regard will be added to the amount of your outstanding balance. Should the balance remain unpaid, our client will take whatever action it deems appropriate, including bringing a lawsuit against all appropriate parties for monetary and other relief, including the full amount of the outstanding invoices, consequential damages, interest, attorney's fees and costs (emphasis in the original).

Neither Care nor its attorneys received any response to this letter. Accordingly, on March 28, 2005 plaintiff filed the original complaint in this case. On April 25, 2005 defendants filed their answer. On August 12, 2005, plaintiff filed a motion for partial summary judgment, which I denied from the bench on September 29, 2005. On September 27, 2005 plaintiff filed an amended complaint. On November 15, 2005 defendants filed their answer to the amended complaint. On January 18, 2006 I issued a memorandum opinion and order granting in part and denying in part defendants' motion to dismiss. On February 15, 2006 plaintiff filed a second amended complaint in order to address certain issues raised in my opinion. On March 10, 2006 defendants filed their answer to the second amended complaint. On April 28, 2006 defendants asked plaintiff to consent to the filing of an amended answer. Plaintiff refused to consent. Accordingly, on June 9, 2006 defendants filed the present motion.

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 13(f), a district court may grant a party leave to set up a counterclaim

by amendment when that party fails to do so in its original pleading "through oversight, inadvertence, or excusable neglect, or when justice requires . . ." Since the omitted counterclaim must be added by amendment, Rule 13(f) must be read together with Federal Rule of Civil Procedure 15(a), *Banco Para el Comercio v. First Nat'l. City Bank,* 744 F.2d 237, 243 (2d Cir. 1984), which directs that leave to amend a pleading "shall be freely given when justice so requires." The decision whether to permit or disallow amendment of a pleading is within the district court's discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971). Although leave to amend is not automatic, "only 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ··· [or] futility of the amendment' will serve to prevent an amendment prior to trial." *Sterling v. Interlake Indus. Inc.,* 154 F.R.D. 579, 588-89 (E.D.N.Y. 1994) (quoting *Foman v. Davis,* 371 U.S. 178, 182 (1962)); *see also Barrows v. Forest Labs., Inc.,* 742 F.2d 54, 58 (2d Cir. 1984). In addition, on a motion to amend an answer to assert counterclaims, the Court should take into consideration whether the proposed counterclaims are compulsory. *Northwestern Nat. Ins. Co. of Milwaukee, Wisconsin v. Alberts,* 717 F.Supp. 148, 153 (S.D.N.Y. 1989).

Defendants have moved to amend their answer to include

counterclaims for fraudulent inducement, breach of contract, and fraud.[2] Plaintiff argues that defendants should not be allowed to amend because (1) their motion is untimely and made in bad faith, (2) the addition of counterclaims would require further discovery, and (3) the counterclaims are meritless.

Plaintiff argues that defendants' motion is untimely because it was made a year and a half after the original complaint was served.[3] Plaintiff contends that since defendants have already filed three answers, and they have already had several opportunities to assert their counterclaims. Pointing to *Starter Corp. v. Converse, Inc.,* 1996 WL 684165, *2 (S.D.N.Y. 1996), plaintiff argues that "[t]he burden is on the party who wishes to amend to provide a satisfactory explanation for the delay." Since defendants have offered no reason for the delay, plaintiff argues that their motion should be denied. However, while the *Starter Corp.* court did take into account the fact that defendants had provided no explanation for delay as one factor weighing against amendment, the court also relied on the fact that the case was proceeding on an expedited trial schedule which allowed for only

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[2] Defendants' proposed amended answer contains a counterclaim for unconscionability. However, defendants now state that they do not wish to pursue that claim.

[3] Defendants note that they have waited only three months to bring this motion since they filed their most recent answer. However, since the original complaint contained allegations about the factual circumstances which give rise to the counterclaims, and defendants could have brought the counterclaims at that point, the relevant time period is a year and half.

four months between the filing of the answer and the trial date. Recognizing that, "delays of several years are considered insufficient to warrant the denial of a motion to amend," *Id.* at *3, the court found that because of the trial posture of the case before it, even a shorter delay was unreasonable. Moreover, the court found that because of the proximity of the trial date, the plaintiff would be prejudiced by what constituted in the circumstances a last minute amendment. In the present case no trial schedule has yet been established, discovery is still ongoing, and the amount of time for which the case has been pending, a year a half,[4] is unfortunately, not unusual in this District. Although defendants have not explained their delay, Rule 13(f) permits amendment even where a party has no justification for failing to assert the counterclaims but failed to do so only through "oversight" or "inadvertence." Accordingly, considering the rule in this Circuit that "the lateness of a motion to amend [alone] is not a proper basis for denying the application," *Golden Trade, S.r.L. v. Jordache*, 143 F.R.D. 504, 506 (S.D.N.Y. 1992)(citing *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987), and the fact that defendants' counterclaims are compulsory I will not deny

[4] Moreover, since the plaintiff twice amended its complaint, most recently on February 15, 2006, much of the delay can be attributed to the plaintiff's amendments. It would be unfair after plaintiff's numerous amendments and their resulting delay to use that delay to prohibit defendants from making their first amendment.

defendants' motion on this ground.

Plaintiff also argues that defendants' counterclaims are being asserted in bad faith to delay the resolution of this matter. Plaintiff argues that the defendants' bad faith is evidenced by the fact that there are eleven docket entries regarding discovery. However, an examination of the docket suggests that these were, for the most part, simply routine minute entries by the Magistrate Judge concerning the scheduling and management of discovery. Without further elaboration or evidence concerning the content of the meetings before the Magistrate, the listing of eleven docket entries concerning discovery over the course of more than a year is insufficient to demonstrate that defendants' request for permission to amend their answer is part of a broader scheme to delay resolution of this matter.

Plaintiff also argues that defendants are proceeding in bad faith because "there is an open question whether defendant M2 Technologies, Inc. [the defendant on behalf of whom the counterclaims are asserted] even exists." Cohen Aff. ¶17.[5]

[5] Plaintiff points to the deposition testimony of two of the individual defendants, Brown and Sartorio. Defendant Brown testified that "he did not know" if M2 was an actual corporation, Brown Dep. 26-31 and Sartorio testified that he had no connection to M2 and did not know if it even existed. Sartorio Dep. 34-35, 31-42, 96-97. Since these individual defendants are being sued on account of their connection to M2 Technologies it is not surprising that they have attempted to distance themselves from M2, even going so far as to claim that they did not know if it existed. This is not dispositive on the issue of whether or not the corporation does in fact exist.

However, since, as plaintiff concedes, the question is an open one, the defendants are free to assert that M2 Technologies does exist and therefore are free to bring a counterclaim on its behalf. The mere fact that the plaintiff disputes whether M2 Technologies exists is insufficient to demonstrate that defendants' contention that M2 does exist constitutes bad faith.

Plaintiff next argues that even if the counterclaims are not untimely or made in bad faith, that the addition of the proposed counterclaims would unduly prejudice plaintiff. The party opposing the motion for leave has the burden of establishing that an amendment would be prejudicial. *Sterling*, 154 F.R.D. at 589. "In determining whether an amendment would cause prejudice, [a court should] consider whether the assertion of the new claim or defense would (I) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; [or] (ii) significantly delay the resolution of the dispute." *Marsh v. Sheriff of Cayuga County*, 36 Fed.Appx. 10, 11 (2d Cir. 2002)(citations omitted). Prejudice from granting a motion to amend is generally found in cases in which "[t]he motion comes on the eve of trial after many months or years of pre-trial activity; the amendment would cause undue delay in the final disposition of the case; the amendment brings entirely new and separate claims, adds new parties or at least entails more than an alternate claim or a change in the allegations of a complaint.

Minoli v. Evon, 1996 WL 288473 (E.D.N.Y. 1996)(quoting *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Corp.,* 68 F.R.D. 383, 385 (N.D.Ill. 1975)).

Plaintiff recently requested and obtained an extension of the discovery deadline until September 29, 2006 so that it could re-depose defendants Monteleone, Brown and Sartorio. Accordingly, to the extent the further questioning of these defendants will be necessitated by the amendment, plaintiff will be able to add questions to the already planned depositions. Even if allowing defendants to assert their counterclaims will necessitate extension of the discovery deadline, the counterclaims sufficiently encompass issues raised by defendants' previously asserted affirmative defenses and arise out of the same set of transactions and occurrences already raised in this action such that an extension will not be unduly prejudicial. *See American Elec. Power Co. v. Westinghouse Elec. Corp.,* 418 F.Supp. 435 (S.D.N.Y. 1976) (no prejudice existed where factual showing necessary to support additional claims arises out of the same transaction and occurrences that were the subject of the underlying claim); *see also Hanlin v. Mitchelson,* 794 F.2d 834, 841 (2d Cir.1986) (amended claims allowed where they were "merely variations on the original theme" and arose "from the same set of operative facts"). In addition, although the case was commenced a little over a year ago, it has not progressed to the point that

defendants' proposed counterclaims are being raised on the eve of trial or will subvert an otherwise imminent disposition of the case. Accordingly, plaintiff will not be prejudiced by allowing defendants to assert their counterclaims.

Plaintiff also argues that the amendments must not be permitted because they are futile. A proposed amendment to a pleading would be futile if it could not withstand a motion to dismiss pursuant to Rule 12(b)(6). *Martin v. Dickson*, 100 Fed.Appx. 14, 16 (2d Cir. 2004).

Defendants' proposed counterclaim for fraudulent misrepresentation alleges that in order to induce defendants to enter into the agreement the plaintiff falsely stated that "the hazardous waste would be carted away by Care for disposal in liquid form" and that "the costs associated with the work performed by Care under the Agreement would be keeping with costs in [the] proposal presented to Care prior to the execution of the Agreement." Proposed Answer to Second Amended Complaint ¶¶111, 113.

To establish a fraudulent misrepresentation claim in New York, a party must show, "(1) that [the defendant] made a misrepresentation (2) as to a material fact (3) which was false (4) and known to be false by [the defendant] (5) that was made for the purpose of inducing [the plaintiff] to rely on it (6) that [the plaintiff] rightfully did so rely (7) in ignorance of

its falsity (8) to his injury." *Sultan v. Read*, 2005 WL 486732, *3 (S.D.N.Y. 2005)(quoting *Cohen v. Koenig,* 25 F.3d 1168, 1172 (2d Cir. 1994). However, when a party alleges both a fraudulent misrepresentation claim and a breach of contract claim, as the defendants have done here, it "must distinguish between the two claims by (1) demonstrating a legal duty separate from the duty to perform under the contract, (2) establishing a fraudulent misrepresentation collateral or extraneous to the contract; or (3) seeking special damages cause by the misrepresentation and unrecoverable as contract damages. *Sultan*, 2005 WL 486732 at *3 (citing *Bridgestone/Firestone v. Recovery Credit Servs., Inc.,* 98 F.3d 12, 20 (2d Cir. 1996)). Defendants have not demonstrated any of these factors. "Simply dressing up a breach of contract claim by further alleging that the promisor had no intention, at the time of the contract's making, to perform its obligations therunder, is insufficient to state an independent tort claim." *Telecom International*, 280 F. 3d at 175 (quoting *Best Western Int'l v. Crown Sanitation Int'l Corp.*, 1994 WL 465905 *4 (S.D.N.Y. 1994). Accordingly, defendants have failed to state a cause of action for fraudulent misrepresentation and the motion for leave to amend to assert such a claim is denied.

Defendants also allege a counterclaim for breach of contract. Plaintiff argues that because to prove a breach of contract under New York law a party must show that, "(1) a

contract existed between the parties; (2) the plaintiff has in all respects complied with its obligations; (3) defendants' alleged failure constitutes a failure to perform its obligation under the contract; and (4) plaintiff has been damaged as a result of the defendants' actions, *Weiss v. La Suisse, Societe D'Assurances Dur La Vie,* 226 F.R.D. 446 (S.D.N.Y)(citations omitted), and because defendants have conceded that they failed to comply with their obligations under the contract by failing to pay plaintiff within 30 days of each invoice, that defendants cannot assert a breach of contract claim. However, it is well established that where one party materially breaches a contract the other side is excused from its performance. *Bernard v. Las Americas Communications*, 84 F.3d 103, 108 (2d Cir. 1996). Since defendants allege that plaintiff materially breached the contract and that defendants' failure to perform was excused by the material breach, defendants may assert a breach of contract claim.

Defendants' last counterclaim asserts that plaintiff fraudulently performed under the contract to obtain excessive profits by inflating the cost of the services. Plaintiff argues that the claim is meritless because it violates the well-settled principle of New York law that "a party cannot maintain a fraud claim if the alleged fraud is merely the breach of a contract." *Arista Technologies, Inc. v. Arthur D. Litte Enterprises, Inc.*,

125 F.Supp.2d 641, 654 (E.D.N.Y. 2000)(citations omitted). In the present case the third counterclaim (the breach of contract claim) alleges that plaintiff failed to provide the necessary waste removal equipment, thus breaching the agreement and forcing defendants to incur unnecessary expenses associated with the completion of the work. The counterclaim at issue here alleges that "[i]n performing its work under the Agreement Care failed to arrange for suitable equipment and supplies to be present at the work site for the purpose of delaying Care's work and inflating the cost of its services." Proposed Answer to Second Amended Complaint. ¶131. Thus, this counterclaim merely alleges that the breach of contract alleged in the third counterclaim also constituted fraud. Accordingly, this counterclaim fails to state a separate cause of action and leave to amend to assert this claim is also denied.

CONCLUSION

For the reasons set forth above defendants' motion for leave to amend its answer is granted in part and denied in part.

The Clerk is directed to transmit a filed copy of the within to the parties and the Magistrate Judge.

SO ORDERED.

Dated : Brooklyn, New York
August 7, 2006

/s/ Charles P. Sifton (electronically signed)
United States District Judge